87-1319

No. —

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEADE ESPOSITO,

Petitioner,

— against —

THE NEW YORK TIMES COMPANY, NEW YORK DAILY NEWS, INC. and THE ASSOCIATED PRESS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether material obtained through court ordered wiretaps, under Title III (18 U.S.C. §2510 *et seq.*), containing allegations of criminal conduct with respect to which no indictment was returned and containing private conversations of persons who were and were not being investigated should be unsealed and released to the press under a qualified First Amendment right of access to pretrial hearings, solely because a defendant in a criminal proceeding has made a motion to suppress under the Fourth Amendment for lack of probable cause.

PARTIES TO THE PROCEEDINGS BELOW

The United States of America, Congressman Mario Biaggi and Meade Esposito were parties to the underlying criminal action. The New York Times Company, the New York Daily News, Inc. and the Associated Press intervened in the criminal action and were, along with Mr. Esposito, parties to the proceedings before the United States Court of Appeals for the Second Circuit, whose decisions and orders are sought to be reviewed by this petition for a writ of certiorari.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION

CITATIONS TO OPINIONS BELOW

The United States Court of Appeals for the Second Circuit issued three opinions in this case. The first is reported at 828 F.2d 110 and has been reprinted at pages A.2 through A.13 of the Appendix attached hereto. The second, dated December 10, 1987, has not yet been reported and has been reprinted at pages A.17 through A.20 of the Appendix. The third opinion, dated January 28, 1988 has not yet been reported and has been reprinted at pages A.23 through A.25 of the Appendix.

The United States District Court for the Eastern District of New York issued an order, dated July 14, 1987, reprinted at page

A.1 of the Appendix, an opinion and order, dated September 22, 1987, reprinted at pages A.14 through A.16 of the Appendix, and an order, dated December 17, 1987, reprinted at pages A.21 through A.22. The District Court also made various oral rulings and findings contained in the transcripts of the proceedings on file in the United States Court of Appeals for the Second Circuit as part of the Record on Appeal there.

The opinions and orders of the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York have been reprinted in the Appendix in chronological order.

JURISDICTION

Petitioner seeks a writ of certiorari to review the orders and decisions of the United States Court of Appeals for the Second Circuit. Jurisdiction of the United States Supreme Court to review these orders and decisions by writ of certiorari is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The United States Constitution, Fourth Amendment, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The United States Constitution, Sixth Amendment, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The United States Constitution, Fourteenth Amendment, Section One, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes by which the government conducted electronic surveillance and which require sealing of all material relating to electronic surveillance, are Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, codified at 18 U.S.C. §2510 *et seq.*, which provide in relevant part:

18 U.S.C. §2518(8)(a):

> Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.

18 U.S.C. §2518(8)(b):

> Applications made and orders granted under this chapter shall be sealed by the judge.

STATEMENT OF THE CASE

A. *Introduction And The Underlying Criminal Action*

Beginning in October, 1985, the government, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-25 (18 U.S.C. §2510 *et seq.*) ("Title III"), conducted electronic surveillance of several persons including Petitioner, Meade Esposito. Presumably, segments of the intercepted communications served as a basis for an indictment returned on March 16, 1987, against Congressman Mario Biaggi and Petitioner.

This indictment was returned in the United States District Court for the Eastern District of New York and alleged, *inter alia*, that Petitioner and Congressman Biaggi violated 18 U.S.C. §201(b)(c)(f) and (g) (former subsections) by Petitioner's payment of spa expenses for Congressman Biaggi, because of Congressman Biaggi's help in trying to resolve disputes between a local ship repair yard and the City of New York and United States Navy. After trial, the jury returned a verdict acquitting the Congressman and Petitioner of conspiracy and bribery charges, and convicting them of violating the so-called "gratuity" statute (18 U.S.C. §201 (f) and (g)) (former subsections) and The Travel Act (18 U.S.C. §1952). The jury also convicted Congressman Biaggi of obstruction of justice. An appeal of the judgments of conviction is presently being prosecuted and is before the United States Court of Appeals for the Second Circuit.

The tape-recorded communications, the applications seeking Title III surveillance authorization, the orders permitting the Title III surveillance and the orders requiring sealing of the tape recorded communications in connection with the government's surveillance of Petitioner were all sealed pursuant to 18 U.S.C. §2518(8)(a)(b) and (c), which provide, in relevant part:

> Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.

> Applications made and orders granted under this chapter shall be sealed by the judge.
>
> Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

B. *The Motion To Suppress*

On June 5, 1987, Petitioner filed with the district court a motion to suppress the evidence to be used at the underlying criminal trial, derived from the government's Title III surveillance, on the grounds that no probable cause existed to warrant such surveillance under the Fourth Amendment. Exhibit "A" attached to the motion papers contains several applications and supporting affidavits of FBI agents and a government attorney seeking wiretap authorizations as well as the initial order granting the government's application for electronic surveillance of several people named and unnamed. These affidavits contain numerous unsupported and unfounded allegations of criminal conduct on the part of Petitioner and others. Indeed, such unsupported and unfounded allegations were never the subject of any indictment. Exhibit "B" contains the full text of the transcripts of conversations that the government relied on in making its application for the initial "bug". The motion papers are replete with oral communications seized under Title III and contain transcripts of numerous tape-recorded conversations intercepted under Title III as well as affidavits and applications in support of the request for Title III surveillance. (R.B.)[1] (A.4.)[2] *See In re the Matter of The New York Times Co.*, 828 F.2d at 112.

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[1] References preceded by "R" are references to items docketed on the clerk's index and supplementary index to the Record on Appeal for the United States Court of Appeals for the Second Circuit, dated July, 1987, in *In re the Matter of the New York Times Co.*, 828 F.2d 110 (2d Cir. 1987).

[2] Numbered references preceded by "A" are references to pages of the Appendix attached hereto.

The motion papers include intercepted communications involving at least nine persons not parties to the underlying criminal action as well as conversations of Congressman Biaggi and Petitioner that were irrelevant to the charges and never introduced at trial. None of the communications contained as exhibits have anything to do with the transactions alleged in the underlying indictment and indeed, the government never sought to introduce any of the conversations at trial. *Id.*

Since the Exhibits annexed to the motion papers contain Title III material and since the papers in support of the suppression motion contain detailed references to specific conversations and information relied on by the government in its application for the Title III surveillance – required to be filed under seal by 18 U.S.C. §2518(8)(a), (b) and (c) – all papers in connection with the motion were filed under seal. The government, also complying with the sealing requirements of Title III, filed under seal its papers in opposition to the motion to suppress. Congressman Biaggi's papers joining in Petitioner's motion were filed under seal as were Petitioner's reply papers. On July 9, 1987, the district court denied the motion to suppress without a hearing or argument. *Id.* (A.5.)

C. *Intervention By Respondents*

On July 9, 1987, the Respondents The New York Times Company, the New York News, Inc. and the Associated Press ("Respondents") intervened in the district court criminal proceedings and applied to unseal and disclose to the general public the Title III material filed in connection with the motion to suppress.

In response to the Respondents' assertion that the qualified First Amendment right of the media should prevail over the rights of privacy, the district court stated:

> We come down now to the problem of privacy. Now, the original application before Judge Glasser and before a number of other judges in this district, in the Southern District and in New Jersey, all contained a great deal of information, including verbatim wiretaps

> which are in the documents, dealing with a great spectrum of material showing no criminal conduct. Discussion of friends about their children and their wife's [sic] and their friends alike.
>
> When the original applications were made, there was a great deal of that information, which will be revealed if I open all of these motion papers up. I'm very reluctant to do that. I understand the need of the public to know about possible criminal conduct. But the whole theory of these wiretaps is that the rights of privacy will be respected.
>
> * * *
>
> You haven't seen the papers. I have. I have you at a disadvantage and I can tell you there is a good deal of that personal nature, the kind of thing you would talk to a sibling about or a friend about, where you would make statements that you would not want to see on the front pages of the Daily News or even lesser papers likes [*sic.*] The Times. (CA. 39-40.)[3]

The district court reiterated this point throughout the hearing:

> Is there not another right, the right of a person not involved at all in any public affairs to have his private affairs spread out on the papers, because – not because of anything he's done but because the Government has used its power to tap wires and insert bugs. (CA. 42.)

D. *New York Times I*

The Respondents appealed the district court's order denying their application to unseal the Title III material to the Second Circuit. In *In re the Matter of The New York Times Co.*, 828 F.2d 110 (2d Cir. 1987) ("*New York Times I*"), the Respondents

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[3] Numbered references preceded by "CA" are references to pages of the Joint Appendix filed in connection with *In re the Matter of The New York Times Co.*, 828 F.2d 110 (2d Cir. 1987)

contended that the district court's order violated their qualified First Amendment right of public access to pretrial proceedings. Indeed, the Respondents recognized the privacy rights attaching to Title III material and further recognized the necessity of showing good cause for the unsealing of Title III materials as set forth in the Title III sealing provisions (18 U.S.C. §2518(8)(a), (b) and (c)). However, the Respondents argued that they were not required to demonstrate good cause since, solely by the making of the motion to suppress, which addressed Title III material, the motion was a pretrial hearing to which they had a qualified First Amendment right of access under *Press-Enterprise Co. v. Superior Court*, __U.S.__, 106 S.Ct. 2735 (1986) ("*Press Enterprise II*") and, accordingly, such materials should be unsealed. That is, but for the making of the motion to suppress, the Respondents conceded that they had no right to obtain the unsealing of the Title III material.

Petitioner and Congressman Biaggi contended that, irrespective of whether a motion to suppress was made, the unsealing of private telephone conversations and affidavits of FBI agents and government attorneys alleging uncharged and unfounded criminal conduct on the part of Petitioner and third parties, having no connection to the indictment at issue, would unfairly violate the rights of fair trial and privacy. Petitioner and Congressman Biaggi further argued that it was the Respondents' burden to establish "good cause" for the unsealing of Title III materials under 18 U.S.C. §2518(8)(b).

In *New York Times I*, the Second Circuit determined that "[w]hile Judge Weinstein appropriately looked to the fair trial and Title III privacy interests at stake, his rulings were not specific enough to meet the requirements of *Press-Enterprise II* and *Waller*". *Id.* at 116. (A.12.) The Second Circuit further found that although wholesale sealing may not be appropriate, redaction of and unsealing the Title III materials would be appropriate. Accordingly, it vacated the district court's prior order, and remanded the case for further proceedings consistent with its opinion. *Id.*

In accordance with the Second Circuit's remand, the district court held proceedings on September 21, 1987 to further consider

what portions, if any, of the papers submitted by the defendants in connection with their pretrial motions to suppress should be unsealed and released for public access. Following the proceedings, the district court ordered, by decision and order dated September 22, 1987, very limited redactions of the motion papers in question:

> Further redactions are not practicable without making the document almost meaningless since the *prejudicial material is woven throughout. Publication of the unredacted portions is probably unfair to at least some of those named. They are accused of serious crimes without being charged and given the right of defense.* This Court is bound by the decision of the Court of Appeals, resting on Supreme Court case law, to minimize redaction in view of First Amendment considerations. (A.15-16.) (Emphasis added.)

In the interests of maintaining the context of the documents being redacted and without making them meaningless, the district court declined to redact conversations seized pursuant to Title III and affidavits of FBI agents and government attorneys containing uncharged and unfounded allegations of criminal conduct on the part of Petitioner and third parties. The district court's opinion also made clear that it was constrained to make only minimal redactions. (R.B.)

E. *New York Times II*

Petitioner appealed the district court's ordered redactions to the Second Circuit, contending that the district court should have made redactions sufficient to protect his privacy interests involved and those of third parties, irrespective of whether such redactions render the documents meaningless.

In *In re the Matter of the New York Times Co.*, ____ F.2d ____ (2d Cir. 1987) ("*New York Times II*"), the Second Circuit again vacated the district court's order and directed the district court to redact the papers in a way which would protect the privacy interests of Petitioner and others, irrespective of whether such redactions would render the documents meaningless.

Thereafter, the district court held a hearing to determine the extent of the redaction of such papers consistent with the mandate of the Second Circuit. During that proceeding, the district court redacted essentially the same portions of the papers prior to the Second Circuit's determination in *New York Times II*. (A.17-20.)

F. *New York Times III*

Petitioner again appealed to The Second Circuit contending that the limited redactions made by the district court were insufficient and violated the privacy rights of Petitioner and others since, among other things, the district court, again, did not redact portions of the papers revealing conversations seized pursuant to Title III and affidavits containing uncharged and unfounded allegations of criminal conduct, which, prior to *New York Times II* it found to be "probably unfair" to Petitioner and third parties. In *In re the Matter of the New York Times Co.*, ____ F.2d ____ (2d Cir. 1988) ("*New York Times III*") the Second Circuit affirmed the district court's rulings and granted a stay, pursuant to F.R.A.P. Rule 41 (b), pending leave to file the instant petition for a writ of certiorari.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER MATERIAL OBTAINED THROUGH COURT ORDERED WIRETAPS, UNDER TITLE III (18 U.S.C. §2510 *ET SEQ.*), CONTAINING ALLEGATIONS OF CRIMINAL CONDUCT WITH RESPECT TO WHICH NO INDICTMENT WAS RETURNED AND CONTAINING PRIVATE CONVERSATIONS OF PERSONS WHO WERE AND WERE NOT BEING INVESTIGATED SHOULD BE UNSEALED AND RELEASED TO THE PRESS UNDER A QUALIFIED FIRST AMENDMENT RIGHT OF ACCESS TO PRETRIAL HEARINGS, SOLELY BECAUSE A DEFENDANT IN A CRIMINAL PROCEEDING HAS MADE A MOTION TO SUPPRESS UNDER THE FOURTH AMENDMENT FOR LACK OF PROBABLE CAUSE

This Petition seeks resolution of the constitutional conflict between the right of privacy and the qualified right of public

access to pretrial proceedings created in determining whether to unseal motions to suppress wiretapped conversations under Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §2510 *et seq.* ("Title III"). In *Press-Enterprise II*, this Court held that the media has a qualified First Amendment right to pretrial suppression hearings and further held, to the extent that closure of the pretrial evidentiary proceedings was requested, closure would be appropriate upon the findings by the court: "first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alteratives to closure cannot adequately protect the defendant's free trial rights." *Id.* 106 S. Ct. at 2743. Neither *Press-Enterprise II*, nor any other decision by this Court, has reached the issue of whether the media should be permitted to intervene in a criminal proceeding and unseal motion papers containing transcripts of intercepted telephone conversations and uncharged and unfounded allegations of criminal conduct, in connection with Title III surveillance, presumptively sealed by Title III, where no hearing was held and the conversations were not used at trial. Nor did *Press-Enterprise II* determine that filing a motion to suppress evidence constitutes a pretrial proceeding for purposes of allowing public access under a qualified First Amendment right.

Thus, the issues raised by this Petition, involving the competing constitutional rights of privacy, fair trial[4] and public access to court proceedings, in the context of criminal pretrial motions, are one of first impression for the Court, as specifically noted by the Second Circuit in *New York Times I*:

> It does not necessarily follow, however, that because there is a qualified public right of access to a pretrial

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[4] While Petitioner's trial and his Sixth Amendment right of a fair trial has terminated, he nonetheless maintains a right of privacy as do other individuals identified in the Title III materials at issue. Also, since the issues here present potentially chilling effects upon the making of suppression motions, as discussed *infra* at page 18, certiorari should be granted to determine the effects, if any, of *Press-Enterprise II* and *New York Times I* on future suppression motions.

> suppression hearing there is also a similar public right of access in connection with a suppression motion. The Supreme Court has not decided this question. (*Id.* 828 F.2d at 114.)

As demonstrated *infra*, the legislative history of Title III reveals that privacy was a critical concern of Congress in enacting the statute in the wake of opinions by this Court holding electronic surveillance violative of privacy rights and therefore, unconstitutional. This intent has been recognized and supported by this Court and throughout the circuits.

A. *Congress' Overriding Concern In Enacting Title III Was The Privacy Right Of Individuals*

The addition of Title III, to the Omnibus Crime Control and Safe Streets Act of 1968, as originally introduced, relates to "the prohibiting, with the exceptions noted, of all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specific types of major crimes after obtaining a court order[.]" S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Admin. News 2112, 2115.

Prior to the enactment of Title III, this Court held electronic surveillance to be unconstitutional. *Berger v. New York*, 388 U.S. 41 (1967); *Katz v. United States*, 389 U.S. 347 (1967). In *Berger*, this Court held unconstitutional a New York State eavesdropping statute as too broad "resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments." *Id.* at 44. Conversations were held to be within the sphere of privacy since "[b]y its very nature eavesdropping involves an intrusion on privacy that is broad in scope." *Id.* at 51-53, 56. Further, it was emphasized that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Id.* at 63.

In *Katz*, 389 U.S. 347, this Court again noted that the Fourth Amendment specifically extends to oral communications and reversed the judgment below since, in part, the government's electronic surveillance had violated the defendant's privacy

rights. *Id.* at 353. It was further said that what a person seeks to preserve as private may be constitutionally protected. *Id.* at 351.

Indeed, the right of privacy is a constitutional right and Title III was drafted to conform to the constitutional standards set out in *Berger* and *Katz*:

> Working from the hypothesis that any wiretapping and electronic surveillance legislation should include the above constitutional standards, the subcommittee has used the *Berger* and *Katz* decisions as a guide in drafting title III. (S. Rep. No. 1097, *supra*, at 2163.)

Congress was aware of the threat that newly developed techniques of wiretapping and electronic surveillance posed: "[P]rivacy of communication is seriously jeopardized by these techniques of surveillance[.] No longer is it possible, in short, for each man to retreat into his home and be left alone." *Id.* at 2154. "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *Id.* at 2153.

In light of Congress' concerns for the protection of privacy rights, as previously promulgated by this Court in *Berger* and *Katz*, Congress adopted strict sealing provisions that must be followed in the authorization of Title III surveillance and disclosure of the intercepted material: "[T]he intent of the provision is that the records should be considered confidential court records." S. Rep. No. 1097, *supra*, at 2193. *See also* 18 U.S.C. §2518(8)(a). Sealing, in full compliance with the statute's requirements, is a prerequisite to lawful disclosure of any Title III interceptions. 18 U.S.C. §2518(8)(a).

Indeed, this Court's decision in *Gelbard v. United States*, 408 U.S. 41 (1972) is often quoted to support the proposition that Congress was aware of compelling privacy concerns in enacting Title III:

> Hence, although Title III authorizes invasions of individual privacy under certain circumstances, the protection of privacy was an overriding congressional concern. (*Id.* at 48.)[5]

While numerous opinions of this Court have, especially in the context of wiretapping, described the right of privacy as being a constitutional right, and Congress, in enacting the sealing provisions of Title III, intended privacy to be an overriding concern, *New York Times I* suggests that the privacy rights, since they are only protected by Title III's sealing requirements, should yield in favor of a qualified First Amendment right of access to public proceedings: "Nevertheless, where a qualified right of access exists, it is not enough to simply cite Title III[;] [o]bviously, a statute cannot override a constitutional right." *New York Times I*, 828 F.2d at 115. As repeatedly stressed here, the sealing requirement of Title III is not simply a statute but represents Congress' intent to prevent an unnecessary invasion of privacy, under the Fourth and Fourteenth Amendments, in light of the *Berger* and *Katz* opinions. The issue before this Court is not as simple as whether a constitutional right should prevail over a statute. Quite the contrary, the issue here involves the direct conflict between the constitutional right of privacy regarding seized telephone conversations and the qualified First Amendment right of access to pretrial proceedings. Indeed, the right to privacy should not be considered inferior to a qualified right of public access.

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[5] At least one former Justice of this Court expressed even greater concerns stating: "Title III...offends the Fourth Amendment, as does all wiretapping and bugging, for reasons which I have often expressed elsewhere." *Gelbard*, 408 U.S. at 62 *(citations omitted) (Mr. Justice Douglas, concurring). See also, National Broadcasting Co. v. United States Dept. of Justice*, 735 F.2d 51, 53 (2d Cir. 1984) (Congress recognized that wiretapping could be highly intrusive of privacy; the legislation therefore specifically put strict limits on wiretapping and how it could be used); *United States v. Clemente*, 482 F.Supp. 102, 106 (S.D.N.Y. 1979), *aff'd without opinion*, 633 F.2d 207 (2d Cir. 1980) (This court is very sensitive to the fact that eavesdropping devices pose a serious threat to liberty); *In re Kansas City Star*, 666 F.2d 1168, 1175-1176 (8th Cir. 1981); *United States v. Dorfman*, 690 F.2d 1230, 1232-1233 (7th Cir. 1982).

B. *The Disclosure Of Third Parties' Names And Unfounded And Uncharged Allegations Of Criminal Conduct Offends The Right Of Privacy As Recognized By The Fourth And Fourteenth Amendments As Well As The Privacy Provisions Of Title III*

New York Times III, as the last decision of the trilogy, unfairly compels the disclosure of the names or identities of a number of third parties who have not been charged with any wrongdoing. While not being charged with any crimes, the names or identities of these individuals are included in these documents in a way which makes it appear that charges have been lodged, merely because the individuals happened to cross paths in some way with Petitioner over the course of the government's initial investigation. The only known unifying element among these individuals is that they all are named or identified in the documents now under seal. Such information, if disclosed, would be devastating to Petitioner, as well as the third parties named in the documents. The documents also refer to intimate conversations of a personal nature involving Petitioner and third parties. Given the inherent intrusion of privacy which electronic surveillance represents, disclosing such information to the general public will, no doubt, have a devastating effect. (R.B.)

New York Times III also unfairly compels the disclosure of certain information which has nothing to do with the reasons why Petitioner and Congressman Biaggi were prosecuted. Thus, it is questionable whether the Respondents' rights should be perceived as public access to a criminal proceeding.

It is well recognized that privacy interests militate against the disclosure of information discovered about individuals in the early stages of criminal investigations. *See, for example, United States v. Smith*, 776 F.2d 1104 (3rd Cir. 1985). Such information is often unfounded and inaccurate yet, when disclosed, carries the imprimatur of official sanction. *Id.* In *Smith*, the Third Circuit barred disclosure of the names of individuals contained in a bill of particulars filed by the government. The court did

so because it correctly recognized that the mere disclosure of these names would communicate to the general public that the government believed that these individuals are or may be guilty of a crime:

> This broad brush assertion will be unaccompanied by any facts providing a context for evaluating the basis for [this belief] with respect to any given individual. When one adds to this the fact that [the government's belief] was formed on the basis of an investigation that had not yet reached the point where [the government] was willing to make a decision whether to prosecute, it becomes apparent that the risk of injury to innocent third parties is a grave one. (*Id.* at 1113.)

Similarly, in *United States v. Ferle*, 563 F. Supp. 252 (D.R.I. 1983), the court barred disclosure of wiretap applications which contained the names of unindicted third parties:

> Where no indictments have issued against persons allegedly involved in criminal activity, there is a clear suggestion that, whatever their truth, the Government cannot prove these allegations. The court of public opinion is not the place to seek to prove them. (*Id.* at 254.)

While *Smith* and *Ferle* have precluded the disclosure of the identities of third parties and uncharged allegations of criminal conduct, *New York Times III* compels the disclosure of such information gleaned during the very first stage of the government's investigation. Disclosure violates the privacy interests of third parties who are named or identified in documents originally filed under seal when they have no notice that they are so named or identified. *See Ferle*, 563 F. Supp. at 255. In these circumstances, persons who are unaware of their connection with the disputed matters will find themselves on public display in an unfavorable light solely as a result of being identified in these documents. Giving notice and a hearing to these third parties is neither mandated nor expressly permitted by 18 U.S.C.

§2518(8)(d). *Id.* Yet without notice, these parties cannot be heard on the unsealing of the documents and will be unable to assert their own privacy interests in non-disclosure. *Id.*

In this case, none of the third parties have any reason to be aware that they are named or identified in the documents at issue. If their names or identities are disclosed, these third parties will become aware that they are named or identified in these sensitive documents at the same time that the general public learns this fact. At that point, any efforts that could have made by these individuals to protect their privacy interests will be moot.

C. *This Court Has Yet To Determine Whether Its Decision In Press-Enterprise II Should Be Extended To Include Motion Papers Which Are Presumptively Sealed by Statute*

Given that this Court in *Berger* and *Katz* has previously held electronic surveillance to be unconstitutional prior to the enactment of Title III and given the specific sealing provisions contained in Title III, to protect against an unnecessary invasion of privacy in accordance with such decisions, this Court has not yet determined whether *Press-Enterprise II* was intended to reach motion papers containing transcripts of private wiretapped conversations and government affidavits, presumptively sealed under Title III, where no hearing was held and the conversations were neither used nor at issue at trial.

In *Press-Enterprise II*, this Court addressed the media's qualified First Amendment right to access to pretrial hearings. *Press-Enterprise II* only involved the closure of extensive pretrial proceedings which were nearly identical to an actual trial. While *Press-Enterprise II* did not involve or address the unsealing of Title III material or the unsealing of motions to suppress, *New York Times III* has extended its application to instances where this Court and Congress have been particularly concerned with the privacy rights of individuals in the context of electronic surveillance. By extending the application of *Press-Enterprise II* to Title III cases and cases involving motion papers alone, without any pretrial hearing, courts in the future will, as in this

case, divulge the names of third parties in a context which will be perceived as unfavorable and prejudicial and further divulge uncharged and unfounded criminal allegations made by the government which will, no doubt, be perceived by the general public as established facts, merely because representatives of the government have alleged it to be so in order to obtain surveillance.

D. *The Chilling Effect On Motions To Suppress And The Impairment Of The Right To A Fair Trial Under The Sixth Amendment*

In *New York Times I*, the Second Circuit noted:

> Appellees emphasized at oral argument that the recognition of even a qualified First Amendment right of access to pretrial motion papers submitted in connection with a criminal proceeding will have a chilling effect upon a defendant's willingness to make pretrial motions in future cases, since a defendant will be hesitant to include in his papers material similar to that proffered here. The argument is a substantial one, although we note that fair trial and privacy interests are often implicated by actions taken, or responses made, in connection with the judicial process. To this extent, chilling effects are no novelty. (*Id.* 828 F.2d at 114.) (Emphasis added.)

In light of *New York Times I*, defendants in a criminal case are forced to weigh the potential impact of adverse publicity, through unsealing, when deciding whether to make a motion to suppress. This chilling effect could prevent meritorious motions from being made purely on publicity grounds. For example, a defendant being charged with a minor crime may be forced not to make a meritorious motion simply because he is afraid that the unsealing of government affidavits will reveal that he was once suspected, although never charged, of some other heinous crime. Indeed, a defendant should not be required to weigh such factors when determining whether to make a suppression motion and, by forcing such factors into the decision-making process, the right of a fair trial under the Sixth Amendment is substantially impaired.

CONCLUSION

It should be resolved whether material obtained through court ordered wiretaps, under Title III, containing allegations of criminal conduct with respect to which no indictment was returned and containing private conversations of persons who were and were not being investigated should be unsealed and released to the press under a qualified First Amendment right of access to pretrial hearings solely because a defendant in a criminal proceeding has made a motion to suppress under the Fourth Amendment. For this reason and all other reasons herein, certiorari should be granted.

Respectfully submitted,

EDWARD BRODSKY
Counsel of Record for Petitioner
Meade Esposito

Of Counsel and On the Petition:
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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In re The Matter of	:	
THE NEW YORK TIMES COMPANY,	:	87 Crim. 151
THE DAILY NEWS AND	:	
THE ASSOCIATED PRESS,	:	Misc. ____ (JBW)
Petitioners.	:	ORDER

UPON the motion of The New York Times Company, The Daily News and The Associated Press to unseal certain papers filed in connection with a defense motion to suppress certain government wiretaps obtained under 18 U.S.C. §2510 *et seq.* (hereinafter "Title III") and due consideration being given to the papers submitted in support thereof and the oral argument had thereon, and upon the Court's finding that the interests of the defendants in a fair trial and the interests of third parties who are referred to and discussed in the wiretaps in question support continued sealing of the aforesaid motion papers, it is, for reasons stated orally on the record,

ORDERED, that the documents currently under seal in this action, which documents were filed in connection with a defense motion to suppress certain wiretaps obtained under Title III, and which contain communications obtained under Title III, be and continue to be sealed and that the same are given to the custody of the clerk of the court to be retained under seal.

Dated: Brooklyn, New York
July 14, 1987

/s/ Jack M. Weinstein
United States District Judge

In re the Matter of The NEW YORK TIMES COMPANY, New York News Inc. and The Associated Press, Appellants.

UNITED STATES of America,

v.

Mario BIAGGI and Meade Esposito,

Defendants-Appellees.

Nos. 267, 355, Docket 87-1324, 87-1392.

United States Court of Appeals,
Second Circuit.

Argued Sept. 2, 1987.

Decided Sept. 14, 1987.

In criminal proceedings, news bureaus moved to make public certain motion papers filed under seal, which were filed to suppress evidence obtained by electronic surveillance. The United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, denied motions, and bureaus appealed. The Court of Appeals, Feinberg, Chief Judge, held that; (1) Court of Appeals had jurisdiction to hear appeals from interlocutory orders of District Court; (2) there is qualified First Amendment right of access to criminal proceedings, which extends to certain pretrial proceedings; (3) qualified First Amendment right of access extends to written documents submitted in connection with judicial proceedings that themselves implicate right of access; (4) right of access to motion papers filed does not mean that papers must automatically be disclosed; and (5) remand was required to enable district court to make specific findings regarding necessity of sealing motion papers.

Vacated and remanded.

See also, D.C., 664 F.Supp. 780.

David A. Schulz, New York City (Rogers & Wells, Richard N. Winfield, Michael F. Coyne, Thomas J. Lilly, Deborah R. Linfield, Marjorie Thalheimer Coleman, Laura R. Handman, of counsel), for appellants.

Edward Brodsky, New York City (Spengler Carlson Gubar Brodsky & Frischling, Thomas H. Sear, Robert J.A. Zito, of counsel), for defendant-appellee Meade Esposito.

Barry Slotnick, New York City, for defendant-appellee Mario Biaggi.

Before FEINBERG, Chief Judge, and PIERCE and ALTIMARI, Circuit Judges.

FEINBERG, Chief Judge:

The New York Times Company, New York News Inc. and The Associated Press appeal from two separate orders of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch.J., denying their motions to make public certain papers filed in connection with pretrial motions in the criminal prosecution of Mario Biaggi and Meade Esposito. The first order denied appellants' motion to make public certain papers filed under seal in connection with a defense motion to suppress evidence obtained by electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., upon a general finding that defendants' interests in a fair trial and the interests of third parties who are referred to in the motion papers justified continued sealing of the papers. The second order denied appellants' motion to make public certain papers filed under seal in connection with a defense motion to preclude the use at trial of a wiretapped conversation between Meade Esposito and an unindicted co-conspirator, upon an apparent finding that the interests of one or more third parties who are referred to in the wiretapped conversation supported continued sealing of the motion papers. For the reasons indicated below, we vacate the district court's orders and remand for proceedings consistent with this opinion.

This case involves the well-publicized criminal prosecution of Congressman Mario Biaggi and Meade Esposito, the former Chairman of the Executive Committee of the Kings County (Brooklyn) Democratic Committee, for alleged corrupt activities involving Coastal Dry Dock and Repair Corporation. The criminal trial is currently under way in the district court. A significant portion of the government's evidence stems from electronic surveillance of defendants and several unindicted co-conspirators conducted pursuant to Title III.

On June 5, 1987, defendants-appellees Biaggi and Esposito moved to suppress the evidence derived from the Title III surveillance on the ground that no probable cause existed to warrant such surveillance. Defendants' motion papers and those of the government in opposition were filed under seal. The papers and the exhibits thereto contain, among other things, (1) the government's initial application and several supporting affidavits seeking authorization for electronic surveillance of Meade Esposito and several other named and unnamed persons; (2) the initial order granting that application; (3) references to, and excerpts from, conversations from a wiretap of an unindicted co-conspirator, authorized pursuant to a previous application under Title III, upon which the government relied to establish probable cause for the wiretap authorization at issue; and (4) references to, and excerpts from, intercepted conversations obtained pursuant to the initial order and extensions thereof.

On July 8, 1987, appellants moved to have these motion papers unsealed and to have any hearing on the suppression motion held in open court. Judge Weinstein held a hearing in open court on July 9, 1987 on appellants' motion, at which time the government stated that it did not object to disclosure. Defendants, however, did object, arguing that Title III required continued sealing of the motion papers unless appellants could show good cause why the papers should be unsealed. Defendants also argued that disclosure would prejudice their Sixth Amendment right to a fair trial, their privacy rights and the privacy rights of third parties.

On July 9, 1987, without a hearing on the suppression motion, Judge Weinstein in open court denied defendants' motion to suppress the wiretap evidence. The judge stated that the motion papers provided him with all the information he needed to determine that there was probable cause to support the wiretap orders. Therefore, according to the judge, it was not necessary to address appellants' request that any hearing on the suppression motion be held in open court. Judge Weinstein also ruled in open court that the papers filed in connection with the suppression motion should remain under seal to protect "the interest of the defendants in a fair trial and . . . the interest of third parties who are referred to in the tapes. . . ." The judge expressed concern that "unless documents of this kind can be sealed in the judgment of the court, it will make it next to impossible in many instances for defendants to make appropriate motions. They'll be chilled from making such motions." By order dated July 14, 1987, the judge directed that the motion papers remain sealed. Six days later, this court granted appellants' motion for an expedited appeal from that order.

On August 21, 1987, appellants again appeared before Judge Weinstein and moved for disclosure of certain papers filed under seal in connection with defendants' pretrial motion pursuant to Rules 403 and 404 of the Federal Rules of Evidence to preclude the use at tiral of a January 8, 1986 wiretapped conversation between Meade Esposito and an unindicted co-conspirator. The judge held that at trial he would exclude evidence of that conversation, stating that it "describe[s] another political figure and possibly can be inferred to suggest that activities similar to ones now being charged took place with that political figure." Judge Weinstein also ruled that the motion papers should remain under seal, expressly stating that he was not resting his decision to continue the seal on potential prejudice in jury selection, but rather on privacy interests. Later, in open court on August 21, 1987, the government asked Judge Weinstein to reconsider his decision to exclude the January 8, 1986 conversation. In doing so, the government disclosed many details of the conversation, including the fact that the political figure described in the

conversation was Executive Assistant to the Chairman of the Republican Party in Suffolk County and his name. Despite this disclosure, by order dated Augsut 24, 1987, the district court directed that the papers at issue remain under seal. A few days later, appellants requested the district court to reconsider its order in light of public disclosure of the political figure named in the papers. This request was denied. Shortly thereafter, this court granted appellants' motion for an expedited appeal from the August 24, 1987 order as well, and the appeal was consolidated for oral argument purposes with appellants' appeal from the July 14, 1987 order.

[1] Although none of the parties has challenged our jurisdiction to hear appeals from what appear to be two interlocutory orders, we must address the question of whether Judge Weinstein's orders are appealable. We believe the orders are appealable for two reasons. First, the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) applies to the appeals, since deferral of a ruling on appellants' claims until a final judgment in the underlying criminal prosecution is entered would effectively deny appellants much of the relief they seek, namely, prompt public disclosure of the motion papers. Cf. *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 19 (2d Cir.1984), cert. denied, 472 U.S. 1017, 105 S.Ct. 3478, 87 L.Ed.2d 614 (1985); *In re Herald Co.*, 734 F.2d 93, 96 (2d Cir.1984). Moreover, as we observed in *In re National Broadcasting Co. (United States v. Myers)*, 635 F.2d 945, 949 n.2 (2d Cir. 1980), there is an even more basic reason why Judge Weinstein's orders are appealable now. Appellants' claims could have been treated by the district court as a new civil case, as opposed to an intervention in the pending criminal case, and the orders would have been final in that case. No jurisdictional significance should attach simply because the district court chose to treat appellants as intervenors in the criminal proceeding.

Turning to the merits, these appeals present two main questions: (1) whether the public's qualified First Amendment right of access to criminal trials extends to the pretrial motion papers filed here under seal, whether or not a hearing on the motion

is held; and (2) to what extent, if any, must a court consider in determining whether public access is appropriate the fact that Title III material is contained within such motion papers.

[2] The Supreme Court has indicated that a qualified First Amendment right of access to criminal proceedings extends to certain pretrial proceedings. See *Press-Enterprise Co. v. Superior Court*, — U.S. —, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("Press-Enterprise II") (qualified First Amendment right of access to criminal proceedings extends to preliminary hearings as conducted in California); *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 2215, 81 L.Ed.2d 31 (1984)(defendant's Sixth Amendment right to an open trial prevented total closure of a suppression hearing, indicating that the First Amendment right would in most instances attach to such proceedings). Even prior to *Press-Enterprise II* and *Waller*, this court had recognized that the First Amendment extends some degree of public access to a pretrial suppression hearing. *In re Herald Co.*, 734 F.2d at 99. We there noted

> It makes little sense to recognize a right of public access to criminal courts and then limit that right to the trial phase of a criminal proceeding, something that occurs in only a small fraction of criminal cases. There is a significant benefit to be gained from public observation of many aspects of a criminal proceeding, including pretrial suppression hearings that may have a decisive effect upon the outcome of a prosecution.

734 F.2d at 98. The same logic applies in extending a qualified First Amendment right of access to a pretrial hearing on a defense motion to preclude the use of certain evidence at trial pursuant to Rules 403 and 404 of the Federal Rules of Evidence. Public disclosure of such proceedings enhances the basic fairness of the judicial process and the appearance of fairness that is essential to public confidence in the system. Cf. *Press-Enterprise II*, 106 S.Ct. at 2740-41. With respect to a motion to suppress evidence obtained by the government, in particular, "[t]here is a legitimate public interest in knowing the grounds on which

government conduct in obtaining evidence is challenged. . . ." *In re Herald Co.*, 734 F.2d at 101.

It does not necessarily follow, however, that because there is a qualified public right of access to a pretrial suppression hearing there is also a similar public right of access to written documents submitted in connection with a suppression motion. The Supreme Court has not yet decided this question. While we did not address the issue head on in *In re Herald Co.*, our analysis clearly indicated that the First Amendment right of access applicable to a suppression hearing extends to the exhibits at the hearing. 734 F.2d at 101. The opinion does not decide, however, the issues raised by application of the First Amendment right of access to the motion papers that had been filed under seal in the case.

[3] Other circuits that have addressed this question have construed the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. See, e.g., *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir.1986); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir.1983). We agree that a qualified First Amendment right of access extends to such documents. Access to written documents filed in connection with pretrial motions is particularly important in the situation presented by Judge Weinstein's July 14, 1987 order, where no hearing is held and the court's ruling is based solely upon the motion papers.

Apellees emphasized at oral argument that the recognition of even a qualified First Amendment right of access to pretrial motion papers submitted in connection with a criminal proceeding will have a chilling effect upon a defendant's willingness to make pretrial motions in future cases, since a defendant will be hesitant to include in his papers material similar to that proffered here. The argument is a substantial one, although we note that fair trial and privacy interests are often implicated by actions taken, or responses made, in connection with the judicial process. To this extent, chilling effects are no novelty. However, where a potential future chilling effect results from the

application of a qualified First Amendment right of access, the chilling effect need not be ignored. The court, in applying the balancing test mandated by the First Amendment, should give added weight to fair trial and privacy interests where requiring disclosure will have a potential chilling effect on future movants.

Appellees also argue that the public's right of access to documents containing Title III material filed in connection with a pretrial motion in a criminal proceeding is expressly and deliberately limited by the statutory sealing requirements of Title III. They stress that 28 U.S.C. § 2518(8)(b) prohibits the disclosure of any application or order made and sealed pursuant to Title III except upon a showing of good cause.

Title III establishes strict procedures for obtaining wiretap authorizations and narrowly prescribes the manner in which wiretap information can be used or disclosed. 18 U.S.C. § 2511 subjects to criminal and civil liability anyone who wiretaps or discloses information so obtained except as provided in Title III. Sections 2516 and 2518 provide for application to be made to a judge in order to obtain authorization for a wiretap and establish strict standards which must be applied by the judge in determining whether such authorization is appropriate. Section 2515 provides that wiretap evidence may not be received in evidence in any trial, hearing or other proceeding before a federal or state governmental body if disclosure of the information would violate Title III. The first two subsections of Section 2517 provide authorization to investigative or law enforcement officials to disclose and use wiretap information in the performance of their official duties and to provide wiretap information to other law enforcement officials. Section 2517(3) provides that any person who has properly obtained wiretap information may disclose such information "while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof." Section 2518(8)(a) provides for the sealing of the contents of intercepted communications and that the presence of the seal, or a satisfctory explanation for the

absence thereof, is a prerequisite for the use or disclosure of wiretap information under Section 2517(3).

It is obvious that although Title III authorizes invasions of individual privacy upon compliance with certain stringent conditions, the protection of privacy was an overriding congressional concern. The Senate committee report that accompanied Title III described the state of the law prior to passage of Title III as thoroughly unsatisfactory and stressed that Title III would provide protection for privacy lacking under prior law. The report stated:

> The tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance. Commercial and employer-labor espionage is becoming widespread. It is becoming increasingly difficult to conduct business meetings in private. Trade secrets are betrayed. Labor and management plans are revealed. No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage . . . .
>
> It would be . . . difficult to devise a body of law from the point of view of privacy or justice more totally unsatisfactory in its consequences [than the present state of the law]. The need for comprehensive, fair and effective reform setting uniform standards is obvious. New protections for privacy must be enacted. Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation.

S.Rep. No. 1097, 90th Cong., 2d Sess., 67, 69 (1968), reprinted in 1968 U.S. Code Cong. & Ad.News 2112, 2154, 2156. See also *Gelbard v. United States*, 408 U.S. 41, 46-49, 92 S.Ct. 2357, 2360-62, 33 L.Ed.2d 179 (1972) (describing the importance Title III places on privacy interests); *United States v. Dorfman*, 690 F.2d 1230, 1232 (7th Cir.1982).

[4] We thus agree with appellees that the right of privacy protected by Title III is extremely important. Nevertheless, where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a statute cannot override a constitutional right.[1] We do not suggest that the existence of Title III material within the motion papers is of little or no significance. Indeed, much of what we have already said suggests precisely the opposite. Certainly, the privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure of the Title III material should weigh heavily in a court's balancing equation in determining what portions of motion papers in question should remain sealed or should be redacted. In this regard, we note the commendable concern Judge Weinstein displayed in attempting to protect the Title III privacy interests at stake in this case. The job of protecting such interests rests heavily upon the shoulders of the trial judge, since all the parties who may be harmed by disclosure are typically not before the court.

[5] Thus, our recognition of a qualified First Amendment right of access to the motion papers filed here does not mean that the papers must automatically be disclosed. The First Amendment right of access to criminal proceedings is not absolute. Proceedings may be closed and, by analogy, documents may be sealed if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly

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[1] On this view, we need not decide whether, as appellants contend, 28 U.S.C. § 2518(8)(b), which authorizes, upon a showing of good cause, the release of applications and orders sealed under the provisions of Title III is simply not applicable here because appellants are not seeking access to Title III applications and orders as such, but merely Title III material to the extent it is contained in the motion papers filed with the court.

tailored to serve that interest.' " *Press-Enterprise II*, 106 S.Ct. at 2743, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 824, 78 L.Ed.2d 629 (1984). Such findings may be entered under seal, if appropriate. *In re Herald Co.*, 734 F.2d at 101. Broad and general findings by the trial court, however, are not sufficient to justify closure. "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the right to a fair trial]." *Press-Enterprise II*, 106 S.Ct. at 2744. Where privacy interests in wiretapped conversations are asserted, the court should consider "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller*, 467 U.S. at 48, 104 S.Ct. at 2216.[2]

[6] While Judge Weinstein appropriately looked to the fair trial and Title III privacy interests at stake, his rulings were not specific enough to meet the requirements of *Press-Enterprise II* and *Waller*. Furthermore, our review of the sealed materials indicates that the wholesale sealing of the motion papers was more extensive than necessary to protect defendants' fair trial rights, their privacy interests and the privacy interests of third persons. We note that now that the jury has been impaneled, defendants' fair trial rights can certainly be adequately protected by sequestration, although we leave to the discretion of the trial judge whether the nature of the sealed materials suggests that sequestration is necessary in this case. To protect whatever privacy interests may be prejudiced by disclosure of the motion papers, redaction of names and perhaps portions of the Title III materials contained in the motion papers, or other appropriate measures, as opposed to the wholesale sealing of the papers, might be appropriate in this case. We note, in particular, with respect to the papers that are the subject of Judge Weinstein's August 24, 1987 order, that much of the Title III material contained in the papers has already been publicized. Nonetheless, limited redaction of the Title III material in the papers may still be appropriate.

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[2] In *Waller*, the wiretap evidence at issue was derived from wiretaps authorized under a Georgia wiretap statute.

We therefore vacate the July 14, 1987 and August 24, 1987 orders and remand the case to the district court for more specific findings, and, if the judge decides to continue in whole or in part the seal that was in effect prior to his orders, for a determination of what portions of the motion papers in question must remain sealed or must be redacted to preserve other values.

Vacated and remanded to the district court for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

IN RE PRESS APPLICATION IN :

UNITED STATES :

— against — :

MARIO BIAGGI and
MEADE ESPOSITO :

MEMORANDUM
AND ORDER
CR-87-151

----------x

A P P E A R A N C E S:

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of Justice

WEINSTEIN, Ch. J.

At the direction of the Court of Appeals the Court has held a hearing. It gave specific reasons for the need to seal or redact in part. *See In Re Matter of the New York Times Company, et al.*, — F.2d —, —, slip sheet 1, 14 (2d Cir. Sept. 14, 1987). For the reasons stated orally on the record, and upon further consideration the court orders:

(1) Copies of the following documents (the documents) are made part of this record.

(a) Memorandum of Defendant Meade Esposito in Support of Motion to Suppress (Ex. 55).

(b) Reply Memorandum of Defendant Meade Esposito in Support of Motion to Suppress (Ex. 55(a)).

(c) Affidavit of Barry I. Slotnick, Esq. dated July 8, 1987 (Ex. 55(b)).

(d) Letter of Leonard Michaels, Esq. dated June 11, 1987 (Ex. 55(c)).

(e) Notice of Motion dated June 5, 1987 (Ex. 54).

(2) The court has marked in red portions of the documents. These portions are ordered redacted. Further redactions are not practicable without making the document almost meaningless since the prejudicial material is woven throughout. Publication

of the unredacted portions is probably unfair to at least some of those named. They are accused of serious crimes without being charged and given the right of defense. This court is bound by the decision of the Court of Appeals, resting on ruling Supreme Court caselaw, to minimize redaction in view of First Amendment considerations.

(3) The United States Attorney shall make a copy of the documents for himself and each defendant. These copies are not to be released.

(4) The originals and copies showing redactions are to be kept under seal until 5:00 P.M. on September 23rd to permit the parties to seek a stay from the Court of Appeals.

(5) If no stay is granted by the Court of Appeals, the United States Attorney shall make a copy of the documents with the portions marked in red physically excised. The physically excised copy shall be placed in the file and made available to the press.

(6) The documents (not physically excised) shall be kept by the clerk under seal until further order of the court or the Court of Appeals.

The Clerk of the Court shall notify all parties.

So ordered.

Dated: Brooklyn, New York
September 22, 1987

/s/ Jack B. Weinstein
Chief Judge, USDC

UNITED STATES COURT OF APPEALS

For the Second Circuit

Nos. 517, 555 August Term 1987

Argued December 3, 1987 Decided: December 10, 1987

Docket Nos. 87-1422
87-1450

In re the Matter of THE NEW YORK TIMES COMPANY, NEW YORK NEWS INC. and THE ASSOCIATED PRESS,

Intervenors-Appellees-Cross-Appellants.

UNITED STATES OF AMERICA

—v—

MARIO BIAGGI and MEADE ESPOSITO,

Defendants,

MEADE ESPOSITO,

Defendant-Appellant-Cross-Appellee.

Before: FEINBERG, Chief Judge, PIERCE and ALTIMARI, Circuit Judges.

Appeal by Meade Esposito from order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch. J., granting in part a motion to make public certain

motion papers containing material obtained by electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., which were filed under seal in connection with the criminal prosecution of Congressman Mario Biaggi and Meade Esposito. Cross-appeal by appellees.

Vacated and remanded.

EDWARD BRODSKY, New York, NY (Spengler Carlson Gubar Brodsky & Frischling, Thomas H. Sear, Robert J.A. Zito, Rhonda D. Orin, of Counsel), for Defendant-Appellant-Cross-Appellee.

DEBORAH R. LINFIELD, New York, NY (New York Times Company, New York, NY, Coudert Brothers, New York, NY, Laura R. Handman, Henry J. Uscinski, of Counsel, Rogers & Wells, New York, NY, Richard N. Winfield, David A. Schulz, Thomas J. Lilly, of Counsel), for Intervenors-Appellees-Cross-Appellants.

PER CURIAM:

Meade Esposito appeals from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch. J., dated September 22, 1987, granting in part a motion by The New York Times Company, New York News Inc. and the Associated Press to make public certain motion papers filed under seal in connection with the criminal prosecution of Congressman Mario Biaggi and Meade Esposito. The motion papers were filed in connection with a pretrial motion to suppress evidence obtained by electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Acts of 1968, 18 U.S.C. § 2510 et seq., and a pretrial motion pursuant to Rules 403 and 404 of the Federal Rules of Evidence to preclude the use at trial of a particular wiretapped conversation. The order was entered after hearings in the district court on September 18 and 21, 1987, following this court's remand in In re The New York Times Co., 828 F.2d 110 (2d Cir. 1987) ("*New York Times I*"). Appellees cross-appeal, challenging the judge's redactions,

if any, that go beyond the identities of strictly private citizens not previously identified with this or any other prosecution, investigation or matter of public concern. The procedural history of the case prior to our remand to the district court is described fully in our opinion in *New York Times I* and will not be repeated here. We will assume the reader's familiarity with that option. We add now only that after our opinion in *New York Times I*, defendants Esposito and Biaggi were acquitted on some charges and convicted on others, and have appealed the latter convictions.

Following the issuance of the mandate in *New York Times I*, Judge Weinstein held hearings on the motion of appellees to determine what portions, if any, of the sealed papers that had been the subject of the appeal in *New York Times I* should be released and what portions should remain under seal. The judge released certain papers, apparently including the papers that were filed in connection with defendants' pretrial motion pursuant to Rules 403 and 404 of the Federal Rules of Evidence, and redacted portions of the documents filed in connection with defendants' suppression motion. Although Judge Weinstein was clearly concerned with the prejudicial impact that disclosure would have on the privacy interests of certain parties named in those documents, he stated in his September 22 order that

> [f]urther redactions are not practicable without making the document[s] almost meaningless since the prejudicial material is woven throughout. Publication of the unredacted portions is probably unfair to at least some of those named. They are accused of serious crimes without being charged and given the right of defense.

The judge also stated, in the September 21 hearing, that such disclosure "will be pernicious with respect to future motions by defense counsel. It will have a chilling effect . . . ." The judge concluded, however, that he was bound by our decision in *New York Times I* "to minimize redaction in view of First Amendment considerations." On September 23, 1987, this court granted appellant's motion for a stay of Judge Weinstein's order pending appeal and, on October 9, 1987, granted appellees' motion

for an expedited appeal. Thereafter, the appeal came before another panel of this court, which by order dated November 17, 1987, referred the appeal to this panel.

Appellant's main claim to us is that the district court did not comply with the directions of this court in *New York Times I*. Examination of the record does reveal that Judge Weinstein may have thought that *New York Times I* mandated the disclosure of the sealed material without further redaction, if such further redaction would result in a document that was "almost meaningless." Since we did not intend *New York Times I* to require such a result, we vacate the September 22 order and remand the case to the district court.

Redaction is permissible under *New York Times I* even if redaction will render "almost meaningless" the documents to be disclosed, if the district judge finds that important Title III privacy interests cannot otherwise be protected and such privacy interests outweigh the public's interest in access. We did not mean to imply in *New York Times I* that the privacy interests protected by Title III should necessarily take a back seat to a qualified First Amendment right of access. Indeed, our opinion made clear that Title III incorporates a very important right of privacy and that in applying the balancing test mandated by Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986), the right of privacy incorporated in Title III "should weigh heavily in a court's balancing equation." *New York Times I*, 828 F.2d at 116.

On remand, Judge Weinstein should make specific findings as to the scope and nature of the Title III privacy interests at stake and decide whether, in his balancing equation, those privacy interests are of sufficient weight to justify more extensive redaction than provided for in the September 22 order even if the remaining document becomes "almost meaningless." In view of our disposition of the case, it is not necessary to address appellees' cross-appeal at this time.

Vacated and remanded to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT [sic]

IN RE THE NEW YORK TIMES COMPANY,:
NEW YORK NEWS INC. AND
THE ASSOCIATED PRESS :

Intervenors-Appellees : No. 87-1422

UNITED STATES OF AMERICA : ORDER

—against— :

MARIO BIAGGI, :

Defendant, :

—and— :

MEADE ESPOSITO :

Defendant-Appellant :

IT IS HEREBY ORDERED and decreed as follows:

(1) This Order regards the following documents (the "documents"):

(a) Memorandum of Meade Esposito in Support of Motion to Suppress (Ex. 55).

(b) Reply of Meade Esposito in Support of Motion to Suppress (Ex. 55(a)).

(c) Affidavit of Barry I. Slotnick, Esq., dated July 8, 1987 (Exh. 55(b)).

(d) Affidavit of Leonard Michaels, Esq. (Exh. 55(c)).

(e) Notice of Motion dated June 5, 1987 (Exh. 54)).

(2) As designated by the Court at a hearing on December 16, 1987, for the reasons stated orally on the record, portions of these documents are ordered redacted. The non-redacted portions shall be disclosed.

(3) Disclosure shall be stayed until 5:00 p.m. on Friday, December 18, 1987.

(4) The transcript of the hearing is expected to be available on December 18, 1987. It may be released absent a stay from the Court of Appeals.

Dated: Brooklyn, New York
December 17, 1987

/s/ Jack B. Weinstein
Chief Judge. U.S.D.C.

UNITED STATES COURT OF APPEALS
For the Second Circuit

August Term 1987

Submitted: January 15, 1988 Decided: January 28, 1988
Docket No. 87-1541

In re the Matter of THE NEW YORK TIMES COMPANY, NEW YORK NEWS INC. and THE ASSOCIATED PRESS,

Intervenors-Appellees.

UNITED STATES OF AMERICA,

—against—

MARIO BIAGGI and MEADE ESPOSITO,

Defendants,

MEADE ESPOSITO,

Defendant-Appellant.

Before: FEINBERG, Chief Judge, PIERCE and ALTIMARI, Circuit Judges.

Appeal by Meade Esposito from order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch. J., mandating disclosure, with certain redactions, of documents filed under seal in connection with a pretrial suppression motion in the criminal prosecution of Congressman Mario Biaggi and Meade Esposito.

Affirmed.

EDWARD BRODSKY, New York, NY (Spengler Carlson Gubar Brodsky & Frischling, of Counsel), for Defendant-Appellant.

MICHAEL J. CALVEY, New York, NY (Coudert Brothers, Henry J. Uscinski; David A. Schulz, New York, NY, Rogers & Wells; Deborah R. Linfield, The New York Times Company, New York, NY, of Counsel), for Intervenors-Appellees.

PER CURIAM:

Meade Esposito appeals from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Ch. J., dated December 17, 1987, mandating disclosure, with certain redactions, of several documents filed under seal in connection with a pretrial motion to suppress evidence obtained by electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., in the criminal prosecution of Congressman Mario Biaggi and Meade Esposito. The order was entered after a hearing in the district court on December 16, 1987, following this court's remand in In re The New York Times Co., No. 87-1422, slip op. at 501 (2d Cir. Dec. 10, 1987) ("*New York Times II*"), which itself followed an expedited appeal from an order entered after our remand in In re The New York Times Co., 828 F.2d 110 (2d Cir. 1987) ("*New York Times I*"). Familiarity of the reader with both opinions will be assumed. On December 22, 1987, this court stayed disclosure of the sealed documents pending disposition of this appeal and expedited the appeal.

Appellant argues that Judge Weinstein's order should be vacated and the matter remanded for a third time because the order violates the privacy interests of appellant, Congressman Biaggi and other third parties. We disagree. Judge Weinstein applied the criteria that we set forth in *New York Times I* and *New York Times II* and we see no persuasive reason for overturning his exercise of discretion.

The judgment of the district court is affirmed. Appellant's request for a stay of mandate pursuant to Fed. R. App. P. 41(b) pending application for certiorari is granted, provided that the application is filed within ten days from the date of this opinion.

Supreme Court, U.S.
FILED
MAR 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MEADE ESPOSITO,

Petitioner,

—v.—

THE NEW YORK TIMES COMPANY, NEW YORK NEWS INC. and THE ASSOCIATED PRESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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23 pp

QUESTION PRESENTED

Whether the lower court properly applied the standards articulated in *Press-Enterprise Co. v. Superior Court*, 487 U.S. 1, 106 S. Ct. 2735 (1986), and *Waller v. Georgia*, 467 U.S. 39 (1984), in ordering the release of redacted versions of pretrial motion papers over defendants' objections based on privacy interests.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1319

MEADE ESPOSITO,

Petitioner,

—v.—

THE NEW YORK TIMES COMPANY, NEW YORK NEWS INC. and THE ASSOCIATED PRESS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

COUNTER-STATEMENT OF THE CASE

In early July 1987, despite the finding that the materials at issue had been legally obtained by the government, the District Court for the Eastern District of New York (the "District Court") entered two separate orders sealing all documents filed in connection with certain pretrial defense motions to suppress evidence made on behalf of two major political figures.[1] After

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1 The original sealing orders were founded on two interests: (1) that of the *defendants* to a fair trial and (2) that of the privacy of *third parties* who were referred to and discussed in the tapes (A-1); the subsequent orders focused solely on privacy interests (A-14-15; A-21-22). (All references to "A-_____" are to the Appendix to the Petition.)

an expedited appeal by the three respondent news organizations, the Court of Appeals for the Second Circuit, basing its decision on a number of recent Supreme Court precedents recognizing a qualified First Amendment right of public access to judicial proceedings, vacated and remanded. *In re Matter of The New York Times Company*, 828 F.2d 110 (2d Cir. 1987) ("*New York Times I*"). The Second Circuit noted that the

> [o]ther circuits that have addressed this question have construed the constitutional right of access to apply to written documents submitted in connection with judicial proceedings that themselves implicate the right of access. [Citations omitted.] We agree that a qualified First Amendment right of access extends to such documents. Access to written documents filed in connection with pretrial motions is particularly important in the situation presented by Judge Weinstein's July 14, 1987 order, where no hearing is held and the court's ruling is based solely upon the motion papers.

Id. at 114.

Recognizing that the material sought to be sealed had been obtained under Title III[2], which mandates certain restrictions on disclosure of the material so obtained, the Second Circuit carefully parsed through the statutory scheme enacted by Congress. The Court appropriately concluded that Section 2517(3) expressly permitted the disclosure of wiretap information in connection with a judicial proceeding, so that no conflict was even presented between the statutory scheme and the constitutional right of access. *See* 18 U.S.C. § 2517(c); *New York Times I* at 114-116. The court was careful to enunciate the balancing test to be applied:

> We thus agree with appellees that the right of privacy protected by Title III is extremely important. Nevertheless, where a qualified First Amendment right of access exists, it is not enough simply to cite Title III. Obviously, a stat-

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2 P.L. No. 90-351, Title III, 82 Stat. 212 (1968) (codified at 18 U.S.C. §§ 2510-2520 (1986)).

> ute cannot override a constitutional right. . . . Thus, our recognition of a qualified First Amendment right of access to the motion papers filed here does not mean that the papers must automatically be disclosed. The First Amendment right of access to criminal proceedings is not absolute. Proceedings may be closed and, by analogy, documents may be sealed if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.' " *Press-Enterprise II*, 106 S. Ct. at 2743, citing *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510. . . . Where privacy interests in wire-tapped conversations are asserted, the court should consider "whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence consisted of the tapes." *Waller* [*v. Georgia*], 467 U.S. at 48, 104 S. Ct. at 2216.

Id. at 115-116 (footnote omitted).[3]

The Second Circuit went on to conclude that, while the District Court had appropriately looked at fair trial and Title III privacy interests, its rulings were not specific enough to meet the requirements for limiting access in criminal pretrial matters articulated by this Court in *Press-Enterprise Co. v. Superior Court* ("*Press-Enterprise II* "), 478 U.S. 1, 106 S. Ct. 2735 (1986) and *Waller v. Georgia* ("*Waller*"), 467 U.S. 39 (1984). The matter was remanded to the District Court for more specific factual findings in accord with the standards enunciated therein. *New York Times I* at 116.

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3 The Government has never opposed Respondents' application to make public the motion papers submitted in connection with the suppression motion. (JA-38.) Noting the Justice Department's policy favoring the "free flow of information to the public," and the "very very narrow set of papers" at issue, revealing only "a narrow set of facts," the Government found an absence of any countervailing factors warranting continued secrecy of the motion. (JA-59-60.) (References to "JA-_____" are references to pages of the Joint Appendix filed in connection with *In re Matter of The New York Times Company*, 828 F.2d 110 (2d Cir. 1987).)

On remand, the District Court held two hearings to determine what, if any, material should be unsealed. After a painstaking review from the bench of each page, word by word, the District Court made numerous redactions in keeping with the mandate of *New York Times I*, and ordered the remaining material released. Petitioner sought a stay, which was granted; the second appeal followed.

However, Petitioner in that appeal failed to explain how the District Court purportedly misapplied the governing standard set forth by the Second Circuit in *New York Times I* or how such continued and complete secrecy was either "essential to preserve higher values" or "narrowly tailored to serve that interest." *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"). Thus, the Second Circuit properly rejected, once again, the position that the motion papers in their entirety must remain secret; in a display of great caution and sensitivity to the privacy interests involved, the matter was remanded yet again with instructions that the District Court review one narrow factual issue.

> Appellant's main claim to us is that the district court did not comply with the directions of this court in *New York Times I*. Examination of the record does reveal that Judge Weinstein may have thought that *New York Times I* mandated the disclosure of the sealed material without further redaction, if such further redaction would result in a document that was "almost meaningless." Since we did not intend *New York Times I* to require such a result, we vacate the September 22 order and remand the case to the district court.

In re Matter of The New York Times Company, 834 F.2d 1152, 1154 (2d Cir. 1987) ("*New York Times II*").

In response to this subsequent remand, the District Court on December 16, 1987, spent almost three hours again reviewing the still-sealed material word by word and making specific redactions, supported by on-the-record findings, in conformance with *New York Times I* and *New York Times II*. Petitioner ap-

pealed yet a third time. This time, without hearing argument, the Court of Appeals affirmed.

> Appellant argues that Judge Weinstein's order should be vacated and the matter remanded for a third time because the order violates the privacy interests of appellant, Congressman Biaggi and other third parties. We disagree. Judge Weinstein applied the criteria that we set forth in *New York Times I* and *New York Times II* and we see no persuasive reason for overturning his exercise of discretion.

In re Matter of The New York Times Company, ____ F.2d ____, ____ (2d Cir. January 28, 1988) ("*New York Times III*"). The Petition for a Writ of Certiorari from this Court followed. The materials remain sealed.

SUMMARY OF ARGUMENT

This Court has already decided the standard to be applied when balancing the constitutional right of access to criminal proceedings with an individual's privacy interest in conversations obtained through legal electronic means. *Press-Enterprise II*, 478 U.S. 1, 106 S. Ct. 2735 (1986); *Waller*, 467 U.S. 39 (1984). This same standard uniformly has been held by lower courts to apply to the underlying motion papers as well as to proceedings in open court.

In *New York Times I*, the Second Circuit correctly applied those authorities. Its subsequent decisions properly held that the District Court's triple review of the materials at issue—first in July, again in September and a third time in December—coupled with the physical redaction of myriad names and references to and involving private individuals in their private business, correctly balanced the constitutional right of access with Title III's concerns with privacy. In limiting redaction of the public record to those matters found by the courts to be necessary to preserve discernible rights and to prevent invasion of deeply personal areas of privacy, the rulings below present no

overriding issue of special importance. There is no basis for the granting of the instant Petition.

REASONS FOR DENYING THE WRIT

THE DECISIONS BELOW CORRECTLY APPLIED THE PRECEDENTS OF THIS COURT TO BALANCE THE CONSTITUTIONAL RIGHT OF ACCESS IN CRIMINAL PROCEEDINGS AGAINST ASSERTED PRIVACY INTERESTS

The courts below correctly found that secreting the bulk of legally obtained information in the public record from public discussion, after extensive redactions which recognized legitimate privacy interests, would impermissibly abridge the public's qualified right of access to criminal proceedings. These decisions are in accord with the well-established precedents from this Court and should not be reviewed on this record.

POINT I

THIS COURT HAS ALREADY RESOLVED THE STANDARD GOVERNING PUBLIC ACCESS TO PRETRIAL PROCEEDINGS

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), this Court first recognized an affirmative, constitutionally-protected right of the public and the press to attend criminal proceedings, for "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Id.* at 572 (Burger, C.J.).[4]

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4 The United States Constitution, through the First and Fourteenth Amendments, thus reflects "a common core purpose of assuring freedom of consent on matters relating to the functioning of government." 448 U.S. at 575. It creates "a guaranteed right of the public" to attend criminal trials. *Id.* at 580.

Following *Richmond Newspapers*, this Court consistently and repeatedly has affirmed the constitutional right of access, both to trial and pretrial proceedings. *See Press-Enterprise II*, 478 U.S. 1, 106 S. Ct. 2735 (1986) (right of access to preliminary hearing including exclusionary motions); *Press-Enterprise I*, 464 U.S. 501 (1984) (right of access to jury selection); *Waller v. Georgia*, 467 U.S. 39 (1984) (Sixth Amendment right of access to suppression hearings); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (right of access to testimony of minor in sex crime prosecution).[5]

The legal issue presented here, as Petitioner frames it, is "resolution of the constitutional conflict between the right of privacy and the qualified right of public access to pretrial proceedings." (Pet. at 10-11.) However, Petitioner does not even mention that this Court already has decided just this issue only four years ago.

In *Waller v. Georgia*, despite the Government's attempt to close a hearing involving the admissibility of wire-tapped conversations (on the theory of protecting the privacy interests of those who were not parties to the criminal prosecution), this Court held that the standards set forth in *Richmond Newspapers* and its progeny fully applied to deciding whether a suppression hearing involving electronically-obtained surveillance information could be closed.[6] The Court specifically noted that the constitutional "aims and interests are no less pressing in a hearing to suppress wrongfully seized evidence." 467 U.S. at

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5 The right of access repeatedly has been held to extend to pretrial suppression hearings such as was at issue below. *See In re Herald Co.*, 734 F.2d 93 (2d Cir. 1984); *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982); *United States v. Brooklier*, 685 F.2d 1162 (9th Cir. 1982); *Associated Press v. Bell*, 70 N.Y.2d 32, 517 N.Y.S.2d 444, 510 N.E.2d 313 (1987).

6 *Waller* addressed the conflict in the context of a defendant's Sixth Amendment challenge to closure of a pretrial suppression hearing, but the Court made clear that the same standards announced in *Richmond Newspapers* and its progeny applied. 467 U.S. at 44-47.

47; *see also Press-Enterprise II*, 478 U.S. at ____, 106 S. Ct. at 2740.[7]

The wiretaps at issue in *Waller* were conducted pursuant to Ga. Code Ann. § 16-11-64 (1982) rather than Title III. However, the Georgia statute requires that wiretaps be kept secret under standards mandated to be at least as protective of privacy as Title III. *See e.g.*, *Evans v. State*, 252 Ga. 312, 314 S.E.2d 421, 425 (1984); *Avers v. State*, 181 Ga. App. 244, 351 S.E.2d 692, 694 (1986); *see also Waller*, 467 U.S. at 41-42 & n.1. In short, this Court's analysis in *Waller* resolved the very conflict presented below: between the public right of access and the protection of legitimate privacy interests.

The decisions below, on the authority of *Waller* and *Press-Enterprise II*, correctly found that this constitutional right extends to written material as equally as to statements in open court. As the Second Circuit recognized, the very concerns that led to recognition of the qualified right of access to judicial proceedings apply fully to criminal motion papers, especially where, as here, "no hearing is held and the court's ruling is based solely upon the motion papers." *New York Times I* at 114. This holding is consistent with the rulings of every other Court of Appeals to have addressed this question. *See In re Washington Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986); *United States v. Smith*, 776 F.2d 1104, 1111-12 (3d Cir. 1985); *United States v. Rosenthal*, 763 F.2d 1291, 1293-94 (11th Cir. 1985); *Brown and Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165,

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7 The fact that intercepted conversations of political figures are involved here does not militate in favor of a more restrictive rule. "The defendant here [is] a prominent politician who at all times during the suppression hearing retained his public offices and positions of political power. He [is] charged with crimes concerning his conduct as a public official and political leader. . . . It is thus vital that proceedings affecting the prosecution of a public figure such as the defendant be held in open court. . . . This need is emphasized in the case of suppression proceedings. . . ." *United States v. Cianfrani*, 573 F.2d 835, 851 (3d Cir. 1978).

1178-81 (6th Cir. 1983); *Associated Press v. United States District Court*, 705 F.2d 1143, 1145 (9th Cir. 1983).[8]

In short, the rulings below present no significant legal issue to be resolved by this Court on the record presented.

POINT II

THE ORDERS BELOW ARE CONSISTENT WITH THE STATUTORY DISCLOSURE PROVISIONS OF TITLE III

Petitioner's assertion that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, constitutes an absolute bar to the public access ordered, simply because electronically intercepted communications are involved in the motion to suppress, was correctly rejected below. Title III, which represents the legislative balance between Fourth Amendment privacy interests and the needs of modern law enforcement, provides for the sealing of recorded communications obtained pursuant to authorized surveillance, 18 U.S.C. § 2518(8), but also authorizes disclosures of intercepted communications in proper circumstances. Specifically, Title III provides that:

> Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter *may disclose the contents of that communication or such derivative evidence while giving testimony* under oath or affirmation *in any proceeding* held under the authority of the United States or of any State or political subdivision thereof.

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8 These decisions acknowledge that there is no reasoned basis to distinguish between oral proceedings and written argument and testimony. Public access to each is equally important to promote the informed discussion of governmental affairs, to promote the fairness of judicial proceedings, and to check corrupt practices through public scrutiny. *See, e.g., Associated Press v. United States District Court*, 705 F.2d at 1145.

18 U.S.C. § 2517(3) (emphasis added). This statutory authorization is simple and explicit; it is *not* restricted to testimony demonstrated to be necessary or relevant to the prosecution of a crime, to testimony already ruled admissible at trial, or even to testimony at a trial rather than in a pretrial proceeding. Congress "must have known that most criminal proceedings are conducted in public, so probably they expected . . . that most testimony authorized by Section 2517(3) would end up in the public domain." *United States v. Dorfman*, 690 F.2d 1230, 1233 (7th Cir. 1982).[9]

The Title III material now at issue was submitted under "oath or affirmation" in a proceeding held under the authority of the United States. Its disclosure thus is authorized by the statute. *See United States v. Rosenthal*, 763 F.2d at 1293 (the "privacy interests expressed in Title III have been overborn by the statute itself which has determined that wiretapping is permissible under these circumstances and that disclosure in open court is appropriate.").[10] Especially given the District Court's determination that the evidence at issue was properly and legally obtained (JA-63-64), there is no statutory or other justification for sealing the entirety of the motion papers. *See United States v. Cianfrani*, 573 F.2d at 859.

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9 *Dorfman* and other Title III cases cited in the Petition were decided prior to *Press-Enterprise I*, *Waller* and/or *Press-Enterprise II*. These cases did not apply the standards subsequently established by this Court to balance privacy interests against the public's right of access to criminal pretrial proceedings.

10 Cases such as *National Broadcasting Co. v. United States Department of Justice*, 735 F.2d 51 (2d Cir. 1984) and *United States v. Ferle*, 563 F. Supp. 252 (D.R.I. 1983), interpreting the "good cause" requirement in Section 2518(8), are beside the point. The instant case does not involve independent discovery of Title III information for civil litigation or for its news value, as was at issue in those cases. Indeed, this case does not involve an application under Section 2518 at all. Rather, it simply seeks to enforce the constitutional right of public access to motion papers filed with the court with due regard given to legitimate privacy interests of private citizens.

Indeed, the public interest in knowing the types of electronic surveillance judicially authorized pursuant to Title III is a particularly strong one. Only with this information can the public demand a more privacy-conscious legislative mandate from the Congress or, alternatively, seek to put even more aggressive crime fighting tools in the hands of prosecutors. Such political accountability is at the core of the First Amendment.[11] *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 606 (1975) (citations omitted) (public "may rightly demand to know what actions are being taken by law enforcement personnel to bring . . . individuals to justice; . . . dissemination of [information about prosecutorial conduct] may generate crucial debate on the functioning of the criminal justice system . . ."); *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

In short, the limited access to pretrial motion papers granted by the orders below is both mandated by the Constitution, authorized by Title III and consistent with the binding authority emanating from this Court.

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11 Petitioner's argument that the disclosure permitted by the orders below may chill future criminal defendants from bringing motions to suppress is insufficient to warrant this Court's review. The fact is that criminal defendants must frequently make decisions throughout a proceeding that implicate both fair trial and privacy interests, including most obviously the decision whether a criminal defendant or a particular defense witness should be called to testify. Thus, there is nothing novel or compelling about Petitioner's "chilling" argument. Moreover, Petitioner's concerns are eviscerated by the fact that the governing standard adopted below specifically balances both fair trial and privacy interests against the qualified First Amendment right of public access and permits the trial court to consider the "chilling" effect in its equation. *See New York Times I*, 828 F.2d at 114.

POINT III

THERE IS NO REASON FOR THIS COURT TO REVIEW THE LOWER COURTS' CORRECT APPLICATION OF THE GOVERNING STANDARD TO THE FACTS PRESENTED

The Second Circuit instructed the District Court to analyze the material at issue based, *inter alia*, upon the holding of *Press-Enterprise I*, to the extent that "deeply personal" information could, "under some circumstances, justify a limited closure of pretrial proceedings." 464 U.S. at 511; *New York Times I* at 116.[12] The District Court painstakingly reviewed the materials on three separate occasions and, after applying the balancing test, ordered numerous redactions of names, identifying characteristics and conversations. The Second Circuit upheld the balance. A *de novo* review by this Court is not warranted.[13]

This Court has recognized that privacy interests of "innocent" citizens, while unmistakably important and deserving of attention, are not absolute but instead are to be weighed against the strong First Amendment rights of the public. It is well settled that, in some instances, individual privacy interests will give way in some part to weightier or more general concerns. *See Press-Enterprise I*, 464 U.S. 501 (1984); *Waller*, 467 U.S. 39 (1984); *In re Herald*, 734 F.2d 93 (2d Cir. 1984); *cf. Cable News*

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12 The specific redactions made by the District Court, while never seen by Respondents, are not being challenged in this proceeding.

13 The lower courts' decisions correctly recognized that "[r]emoval of all references to any third party [or wholesale sealing] nullifies the ruling[s] of this court . . ." and would not be countenanced. *United States v. Criden*, 681 F.2d 919, 921 (3d Cir. 1982); *see New York Times I* at 116 (some redaction may be necessary); *see e.g.*, *Press-Enterprise II*, 478 U.S. at _____; 106 S. Ct. at 2743-44; *Press-Enterprise I*, 464 U.S. at 510.

Network, Inc. v. United States, 824 F.2d 1046 (D.C. Cir. 1987).[14]

A generalized concern over privacy is not sufficient to defeat the right of public access to criminal proceedings absent evidence that the information to be disclosed is likely to "inflict unnecessary and intensified pain" on third parties "who the Court reasonably finds are entitled to such protection", a standard not met here. *United States v. Criden*, 681 F.2d 919, 921 (3d Cir. 1982); *cf. Press-Enterprise II*, 478 U.S. at ____, 106 S. Ct. at 2743 (adopting a "substantial probability of prejudice" standard for closure).[15] Thus, there is no reason for this Court to conduct its own factual inquiry for, even after three trips to the Court of Appeals and five hearings before the District Court, the Petition is devoid of any factual showing of "whose privacy interests might be infringed, how they would be infringed, [and] what portions of the tapes might infringe them. . . ." *Waller*, 467 U.S. at 48; *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. at 558.

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14 Petitioner's reliance on the District Court's passing observation, at the second hearing, that release of certain information would be "probably unfair", is unavailing, as the "probably unfair" standard has never been adopted by any court of this country.

15 Indeed, the lower courts here implicitly found that "[v]ery few of the references to third parties, albeit unflattering, and we may assume false, rise to the level of "intensified pain", as distinguished from mere embarrassment, which would warrant deletion. . . ." *United States v. Criden*, 681 F.2d at 922 (denying redaction of *all* references to *all* third parties in trial materials obtained under Title III in "Abscam" case).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

March 4, 1988

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RULE 28.1 CERTIFICATE

Respondent The New York Times Company respectfully advises the Court pursuant to Rule 28.1 of the Rules of this Court that it has no parent company and that it has no affiliates or subsidiaries, other than wholly-owned subsidiaries, which are publicly traded.

Respondent New York News Inc., incorrectly named herein as New York Daily News, Inc., advises the Court that it is a corporation wholly owned by The Tribune Company, a Delaware corporation, and that it has no subsidiaries or affiliates.

Respondent The Associated Press advises the Court that it is a mutual news cooperative organized under the New York Not-For-Profit Corporation Law. The Associated Press is a news wire service whose primary purpose is gathering, editing and transmitting news reports and photographs to its 1,350 member newspapers and its 3,950 member broadcast stations throughout the United States. The Associated Press advises the Court that it has no parent company and that it has no affiliates or subsidiaries other than wholly-owned subsidiaries, which are publicly traded.